



Robbins Schwartz
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PREGNANT AND PARENTING REQUIREMENTS – STUDENTS AND EMPLOYEES

July 30, 2024 & August 1, 2024

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Title IX Rules on Pregnancy and Parenting: A Webinar for Higher Education Institutions

Presented by:

Emily P. Bothfeld & Holly E. Jacobs

July 30, 2024 & August 1, 2024

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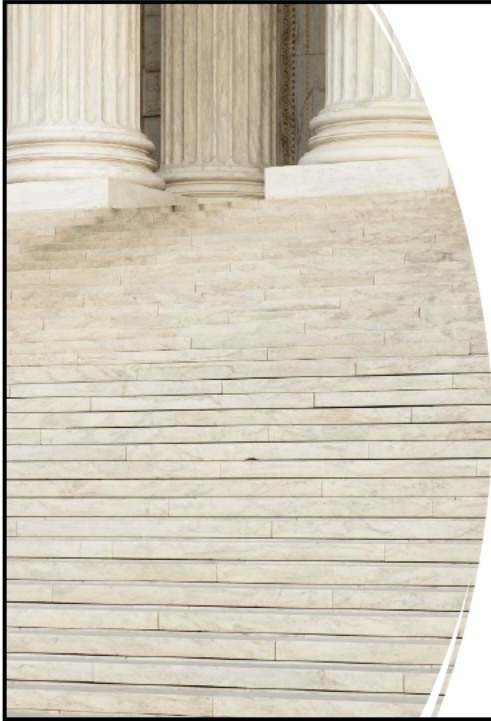
Robbins Schwartz 2024 Title IX Compliance Training

- **Part 4 – Pregnancy and Parenting Requirements**
 - Tuesday, July 30 from 1:00-2:30
 - Thursday, August 1 from 9:00-10:30
- **Part 5 – Illinois Preventing Sexual Violence in Higher Education Act**
 - Tuesday, August 6 from 9:00-10:30
 - Thursday, August 8 from 1:00-2:30



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.



Pregnancy and Parenting – Agenda

- General Prohibitions and Definitions
- Pregnant or Parenting Students
 - Parental, Family, Marital Status
 - Response to Student Pregnancy
 - Reasonable Modifications
 - Lactation
 - Voluntary Access
 - Voluntary Leave
 - Documentation and Certifications
- Pregnant or Parenting Employees
 - Parental, Family, Marital Status
 - Pregnancy Discrimination
 - Pregnancy Accommodations
 - Lactation
 - Employee Leave
 - Documentation and Hiring Inquiries



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Sex Discrimination under Title IX

Reminder:

- Sex discrimination includes discrimination based on:
 1. Sex stereotypes
 2. Sex characteristics
 3. Pregnancy or related conditions
 4. Sexual orientation
 5. Gender identity



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Prohibitions Related to Pregnancy and Parenting

Prohibited College Actions	Students and Applicants	Employees and Applicants
Discrimination based on pregnancy or related conditions	X	X
Any policy, practice, or procedure, or any employment action, treating individuals differently based on sex regarding their parental, family, or marital status	X	X
Any policy, practice, or procedure, or any employment action, treating individuals differently based on sex regarding whether the individual is the head of household or principal wage earner in their family unit		X
Pre-admission or pre-employment inquiry about marital status	X	X



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What is considered “pregnancy or related conditions”?

- Pregnancy, childbirth, termination of pregnancy, lactation
- **Medical conditions** related to pregnancy, childbirth, termination of pregnancy, or lactation
- **Recovery from** pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions



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Parental, Family, Marital Status

What is “parental status”?

- The status of a person who, with respect to another person under the age of 18 or incapable of self-care, is:
 - Biological parent, adoptive parent, foster parent, stepparent
 - Legal custodian or guardian
 - *In loco parentis* with respect to such a person
 - Actively seeking legal custody, guardianship, visitation, or adoption of such a person

What is “family status”?

- Department of Education “considers the term to be broadly inclusive and refers to the configuration of one’s family or one’s role in a family.”



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Pregnant & Parenting Students



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Other Applicable Laws

- ADA/Section 504
- Illinois Human Rights Act
 - Prohibits discrimination based on pregnancy
 - HB 4867: Amendment to prohibit discrimination on basis of reproductive health decisions
 - Contraception
 - Fertility or sterilization care
 - Assisted reproductive technologies
 - Miscarriage management care
 - Healthcare related to continuation or termination of pregnancy
 - Prenatal, intranatal, or postnatal care



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Parental, Family, Marital Status

What is prohibited?

- Title IX prohibits discrimination *on the basis of sex* with regard to parental, family, or marital status
- Does not limit the timing of the parental, family, or marital status
 - “current, potential, or past”
- Does not protect parental, family, or marital status itself



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Parental, Family, Marital Status

Examples of what to avoid:

- Treating female students differently than male students based on risks to their reproductive health
- Discouraging female students from having (more) children in order to improve career prospects
- Providing counseling to new mothers with postpartum mental health needs, but not new fathers with similar conditions
- Providing modifications for mothers based on childcare needs, but not fathers



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Employee Response to Student Pregnancy

- When a **student**, or a person with **the legal right** to act on behalf of a student informs an employee of the student's pregnancy or related condition, the employee **must** promptly:
 1. Provide the student with the contact information for the College's Title IX Coordinator
 2. Inform the student that the Title IX Coordinator can arrange specific actions to prevent sex discrimination and ensure the student's equal access to the College's education program or activity.

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Title IX Coordinator Response



- Once a student, or a person with the legal right to act on behalf of a student informs the Title IX Coordinator, the College must:
 1. Inform the student (and if applicable, the person who notified the Title IX Coordinator) of specific obligations the College has under Title IX regarding student pregnancy or related conditions;
 2. Provide the student with the College's notice of nondiscrimination; and
 3. Otherwise ensure that, upon receiving a report that a student is experiencing pregnancy or a related condition, the College takes action to promptly and efficiently prevent sex discrimination.

Reasonable Modifications

- The Title IX Coordinator must make reasonable modifications to the College's policies, practices, or procedures to enable the student to access the education program or activity.
- The College must implement any modifications proposed by the College and accepted by the student.
- Reasonable modifications must:
 1. Be based on the student's individualized needs; and
 2. Be developed in consultation with the student.
- A modification that would fundamentally alter the nature of the College's education program or activity is not a reasonable modification.

Reasonable Modifications: Examples

- Additional breaks (e.g., drink, use restroom, eat, rest, lactation)
- Absences for medical appointments
- Access to online or homebound education
- Changes to schedule
- Changes to course sequence
- Extensions of time or rescheduling
- Sitting or standing
- Carrying or keeping water nearby
- Counseling
- Changes in physical space (e.g., larger desk, footrest)
- Changes in supplies (e.g., larger uniform, additional PPE)
- Elevator access
- Parking
- Lactation space
- Leave of absence



Reasonable Modifications: Other Laws

- Americans with Disabilities Act/Section 504
- Illinois Human Rights Act
 - Discrimination based pregnancy, including harassment, for places of public accommodation
 - New addition coming: Reproductive decisions
 - There are more detailed provisions related to reasonable accommodations for employees.

Lactation Spaces

- The College must ensure the student can access an adequate lactation space, that is, an area other than a bathroom that is:
 1. Clean;
 2. Shielded from view;
 3. Free from intrusion from others; and
 4. May be used for expressing breast milk or breastfeeding as needed.
- When does “as needed” include?



Voluntary Access

- Student must be allowed to voluntarily access any separate and comparable portion of the College’s education program or activity
- Voluntary access = College cannot coerce or pressure a student to participate in the separate and comparable portion
- Separate portion must be “comparable” to what is offered to students who are not pregnant and do not have related conditions
- What does “comparable” mean?
 - Does not mean “substantially equal”
 - Of “equivalent quality or similar such that it is capable of comparison”

Voluntary Leave



- Student experiencing pregnancy or related conditions must be allowed to voluntarily take a leave of absence
 - Enrolled OR admitted student
 - Cannot require student who needs leave prior to start of school or within the first few weeks to withdraw and reapply – must also exempt from any general policy that would require such
- Must cover, at minimum, period of time deemed medically necessary by licensed healthcare provider
- Upon the student’s return, the student must be reinstated to the academic status held before the leave
- As practicable, student must also be returned to the extracurricular status held before the leave



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Voluntary Leave – Clinicals and Internships

- College is not required to completely waive requirements that demonstrate academic competency, such as clinical components
- Likely will be significant overlap with obligation to provide reasonable modifications in dealing with clinical courses or internships
 - Defer or make up examinations
 - Allowing for untimed examinations
 - Reducing or modifying duties in required clinical courses
 - Deferring to another semester the completion requirement for a clinical course or internship



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Voluntary Leave – Course Sequences



- What happens when a student misses an entire course in a sequence?
 - ENG 101 ~~ENG 201~~ ENG 302
- Student must be allowed to voluntarily take leave, even if that leave would cause them to miss an entire course in a sequence
 - College must also reinstate that student after the leave expires
- Upon return, College may offer to change the student's course sequence as a reasonable modification
 - ENG 101 ENG 302 ENG 201
- Can the College require the student to take a leave that is longer than medically necessary in order to align with the course sequence?

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Requiring Documentation

- Generally can only require documentation if it is necessary and reasonable in order for the College to determine what modification to offer and other specific actions to take
 - E.g., requiring a student who requests to take courses online in order to follow bedrest recommendation to submit documentation to support the need for bedrest (NOT the underlying pregnancy)
 - E.g., requiring a student who requests to not lift heavy objects during clinical to submit documentation to support the need or the extent of the lifting restriction (NOT underlying pregnancy)
- When is documentation not necessary and reasonable?
 - When the need of the student is obvious
 - When documentation supporting the need has been previously provided
 - When dealing with lactation needs
 - When the specific action is available to students for reasons other than pregnancy or related conditions without supporting documentation

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Certifications of Physical Ability

- The College can only require certification that the student is physically able to participate in a class, program, or extracurricular activity if:
 1. The certified level of physical ability or health is necessary for participation;
 2. The certification is required for all students participating; and
 3. The information obtained is not used as a basis for discrimination prohibited by Title IX.



Pregnant and Parenting Employees



Other Applicable Laws

- Title VII (as amended by the Pregnancy Discrimination Act)
- PUMP Act
- Pregnant Workers Fairness Act
- Illinois Human Rights Act
- Nursing Mothers in the Workplace Act
- Americans with Disabilities Act
- Family and Medical Leave Act



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Prohibitions on Discrimination



- The College must not discriminate based on current, potential, or past pregnancy or related conditions.
- The College must not adopt or implement any policy, practice, or procedure, or take any employment action, that treats individuals differently *on the basis of sex*:
 - Concerning the current, potential, or past parental, family, or marital status of an employee or applicant, or
 - Based upon whether the employee or applicant is the head of household or the principal wage earner in their family unit.



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Parental, Family, Marital Status

- Title IX prohibits institutions from adopting policies, practices, procedures, or from taking any employment action *on the basis of sex* with regard to:
 - The parental, family, or marital status of an employee or applicant
 - Whether the employee or applicant is the head of household or the principal wage earner in their family unit
- Does not limit the timing of the parental, family, or marital status
 - “current, potential, or past”



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Parental, Family, Marital Status

Examples of what to avoid:

- Treating female employees differently than male employees based on risks to their reproductive health
- Offering evening assignments to men instead of women based on assumptions about their caretaking roles at home
- Providing counseling to new mothers with postpartum mental health needs, but not new fathers with similar conditions
- Offering a job to a male applicant over a female applicant based on assumptions about their roles as a primary or secondary wage earner



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Pregnancy Discrimination

- The College must treat pregnancy and related conditions as any other temporary medical condition for all job-related purposes including:
 - Commencement of employment
 - Duration of leave
 - Extensions of leave
 - Payment of disability income
 - Accrual of seniority and any other benefit or service
 - Reinstatement
 - Fringe benefits offered to employees by virtue of employment
- College cannot take any employment action on the basis of current, potential, or past pregnancy or related conditions.



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Reasonable Modifications

- Title IX rules do not include a freestanding requirement to provide reasonable modifications for employees who are pregnant or have related conditions.
- However, Title IX rules do require reasonable modifications for any job-related purpose to the extent those modifications would be provided for other temporary medical conditions.
- Other laws overlap and may extend beyond Title IX requirements.



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Reasonable Modifications

- Pregnant Workers Fairness Act
 - Could require the temporary suspension of essential functions in some cases.
 - Provides that sitting, standing, keeping water nearby, and breaks to drink, eat, or use a restroom will be reasonable accommodations “in virtually all cases.”
- Illinois Human Rights Act
 - Includes a rebuttable presumption that an accommodation does not impose an undue hardship if the employer provides a similar accommodation to similarly situated employees.



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Pregnancy Accommodations: Examples



- Additional breaks (e.g., drink, use restroom, eat, rest, lactation)
- Sitting or standing
- Carrying or keeping water nearby
- Absences for medical appointments
- Changes to schedule
- Extensions of time or rescheduling
- Changes in physical space (e.g., larger desk, footrest)
- Changes in supplies (e.g., larger uniform, additional PPE)
- Elevator access
- Parking
- Lactation space
- Light duty or assistance with manual labor
- Job restructuring
- Temporary transfer to less hazardous work
- Remote work
- Reassignment to a vacant position
- Leave of absence



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Lactation

- The College must provide employees with reasonable break time for the expression of breast milk or for breastfeeding as needed.
- The College must ensure the employee can access an adequate lactation space, that is, an area other than a bathroom that is:
 1. Clean;
 2. Shielded from view;
 3. Free from intrusion from others; and
 4. May be used for expressing breast milk or breastfeeding as needed.
- Other laws overlap and may extend beyond Title IX requirements.



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Employee Leave

- The College must allow the employee to take accrued leave consistent with any applicable College leave policy.
- If the employee has insufficient accrued leave, the College must allow for a voluntary leave of absence without pay for a “reasonable period.”
- At the end of this leave, the employee shall be reinstated to the same or a comparable position, without decrease in rate of pay or loss of promotional opportunities.
- Consider whether additional leave is required by
 - FMLA
 - ADA
 - Pregnant Workers Fairness Act



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Family Responsibilities – HB 2161

- Sent to Governor on June 21, 2024
- Amends IHRA to prohibit taking adverse employment action, harassing, or retaliating against an employee based on “family responsibilities”
- “Family responsibilities”: actual or perceived provision of personal care to a family member, as defined in the Employee Sick Leave Act
- May not be construed to “obligate an employer ... to make accommodations or modifications to reasonable workplace rules or policies.”
- Effective January 1, 2025 (if not vetoed)



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Requiring Documentation

- Would documentation be required for other temporary medical conditions?
- Pregnant Workers Fairness Act
 - Only when it is reasonable under the circumstances, which does not include when:
 - The condition/limitation and the needed adjustment at work are obvious and the employee provides self-confirmation
 - The employer already has sufficient information
 - The requested accommodation is sitting, standing, keeping water nearby, and breaks to drink, eat, or use a restroom, and the employee provides self-confirmation
 - The requested accommodation is related to pumping or nursing at work, and the employee provides self-confirmation
 - When the requested accommodation is available to other employees without supporting documentation



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Hiring Inquiries

- The College may not make pre-employment inquiries into the marital status of any applicant.
 - Cannot inquire whether an applicant is “Miss or Mrs.”
- The College may ask applicants to self-identify their sex, but only if the question is asked of all applicants and is not a basis for employment decisions.



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Emily Bothfeld counsels higher education institutions and K-12 school districts on various issues, including student discipline, Title IX, free speech and expression, student disability rights, board governance, and policy development. In her role leading the firm's Title IX practice, Emily performs extensive work with educational institutions to ensure compliance with Title IX and related laws in all aspects of employment and education, including recruitment, admissions, academic programs, counseling, financial assistance, athletics and extracurricular activities, and facilities access. Emily was instrumental in Robbins Schwartz's development of policies, procedures, and training materials for school districts and higher education institutions in response to the United States Department of Education's 2020 amendments to the Title IX regulations, and Emily has significant experience working closely with Title IX Coordinators and administrators tasked with investigating and adjudicating sexual harassment reports and complaints.

Emily also represents both educational institutions and private companies in matters related to student privacy. She regularly advises school districts regarding privacy considerations and compliance requirements associated with the use of educational technology platforms. She has significant experience negotiating data privacy agreements and education-related service agreements on behalf of schools and organizations. In 2020, Emily co-drafted the Illinois addendum to the National Data Privacy Agreement ("NDPA"), a standardized agreement used by school districts and educational technology vendors throughout the United States to streamline the contracting process and establish a consistent framework for protecting and managing student data. The NDPA is currently being utilized by approximately 750 school districts in Illinois and over 11,000 nationally to facilitate compliance with state and federal student privacy and security laws.

Emily has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General, and Illinois Department of Human Rights. Emily regularly defends educational entities in state and federal court in defending against constitutional, civil rights, and breach of contract claims.

Before joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.



PRACTICE AREAS

Education Law
Higher Education
Special Education
Student Discipline

EDUCATION

J.D., *with honors*, George Washington University Law School

B.S., *cum laude*, Vanderbilt University

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U.S. Court of Appeals for the Seventh Circuit

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

ORGANIZATIONS

Trustee, Associated Colleges of Illinois

Chicago Bar Association

Illinois Council of School Attorneys

National Council of School Attorneys

RECENT PUBLICATIONS

“College Admissions Under Fire as Top Court Takes Affirmative Action Case,”
Chicago Daily Law Bulletin (2022)

“Disabled Athlete Can’t Support ADA Claims,” *Chicago Daily Law Bulletin* (2018)

RECENT PRESENTATIONS

Best Practices for Safeguarding Data in an Increasingly Digital World, SecurED
Schools: K-12 Data Privacy and Cybersecurity Conference (January 2023)

Legal Gymnastics in the Age of COVID and Other Challenges, Illinois Council of
Community College Presidents Retreat (January 2022)

*Making Sense of the Alphabet Soup: FERPA, COPPA, SOPPA, ISSRA, MHDDCA,
and PIPA and Strategies for Compliance*, Secured Schools K-12 Data Privacy and
Cybersecurity Conference (January 2022)



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Holly counsels employers on many aspects of labor and employment law, including employee discipline, internal investigations, federal and state employment discrimination matters, labor relations, and Title IX investigations and compliance. She represents both private and public sector employers and advises school districts, municipalities, and institutions of higher education.

Prior to joining Robbins Schwartz, Holly clerked at a private higher education firm, interned with the Equal Employment Opportunity Commission and Chicago Public Schools, and served as a judicial extern for the Honorable Judge Virginia M. Kendall of the United States District Court for the Northern District of Illinois. She received her Juris Doctor from Loyola University Chicago, where she also completed a master's degree in Cultural and Educational Policy Studies. Her master's thesis focused on legal reparations and decolonization efforts regarding Indigenous boarding schools in Canada and the United States. During law and graduate school, she served as the Editor-in-Chief of the Loyola International Law Review, and published articles at Loyola University Chicago and Columbia University. Prior to law school, Holly taught English as a Second Language in Nordhorn, Germany.

Holly is a member of the American Educational Research Association, which is a national research society dedicated to advancing knowledge about education and promoting the use of research to improve education and serve the public good. She was selected as a peer reviewer for research paper submissions to AERA's 2024 Annual Meeting.

AWARDS

American Educational Research Association - selected reviewer for submissions to AERA 2024 Annual Conference; Panels reviewed: De/Colonization and Transformative Curriculum Studies; Legal and Judicial Issues for Equity and Access; Decolonial, Postcolonial, and Anti-Colonial Studies in Education; Indigenous Peoples of the Americas; and Law and Education.

RECENT PUBLICATIONS

Jacobs, H (2023). Decolonizing a Settler Colonial State: How Canada and the United States Have Approached Investigations into Indigenous Boarding and Residential Schools



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Labor & Employment

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